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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO VALENTINO et al., Defendants and Appellants.	D049996 (Super. Ct. No. SCD193335)

APPEAL from judgments of the Superior Court of San Diego County, Browder A. Willis III, Judge. Affirmed as modified, with directions.

INTRODUCTION AND CONTENTIONS

This case involves separate appeals by defendants Antonio Valentino, Sadiq Olakunle Saibu,[1] and Michael Jerome Squire (collectively appellants) following their

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1 Although portions of the record and two of the three opening briefs on appeal, including his own, refer to Saibu as "Salbu," the record shows that Saibu's trial counsel informed the court that Saibu is his client's true name. The abstract of judgment, dated February 14, 2007, incorrectly names defendant as "Salbu" and must be amended to reflect defendant's true name.

convictions and sentencing for various offenses related to three bank robberies, a credit union robbery, and an attempted jewelry store robbery all committed in the latter part of 2005.[2]

The San Diego County District Attorney filed a second amended consolidated information (information) against appellants and three other defendants (Keith Anthony Coleman, DeWayne David Cummings, Jr., and Ken Buckley, who are not parties to the instant appeals). With regard to the three bank robberies—the August 13 Wells Fargo Bank robbery on El Cajon Boulevard, the August 19 World Savings Bank robbery in La Mesa, and the August 29 Wells Fargo Bank robbery on Black Mountain Road—the information charged appellants with conspiracy to commit bank robbery (count 1, Pen. Code,[3] § 182, subd. (a)(1)), kidnapping for robbery (count 2, § 209, subd. (b)(1)), robbery (counts 3 [August 13 Wells Fargo Bank robbery], 6 [August 19 World Savings Bank robbery] & 9 [August 29 Wells Fargo Bank robbery], § 211), unlawful driving and taking of a vehicle (counts 4, 7 & 11; Veh. Code, § 10851, subd. (a)), and assault with a firearm (count 10, § 245, subd. (a)(2)). With regard to those robberies, Valentino and Squire were also charged with unlawful possession of a firearm by a felon (counts 5, 8 & 12; § 12021, subd. (a)(1)).

With regard to the September 8 USA Federal Credit Union robbery in Mira Mesa, the information charged Valentino with additional counts of robbery (counts 13, 14 & 16,

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2 All further dates are to calendar year 2005 unless otherwise specified.

3 All further statutory references are to the Penal Code unless otherwise specified.

§ 211), making a criminal threat (count 15, § 422), assault with a firearm (count 17, § 245, subd. (a)(2)), and possession of a firearm by a felon (count 18, § 12021, subd. (a)(1)).

With regard to the November 23 attempted robbery at the VIP Jewelry Store in San Diego, the information charged Squire with attempted robbery (count 19, §§ 211 & 664), and burglary (count 20, § 459).

The information further alleged (1) as to counts 2, 3, 6, and 9, that appellants personally used a firearm within the meaning of section 12022.53, subdivision (b) (hereafter section 12022.53(b)); (2) as to count 10, that appellants personally used a firearm within the meaning of section 12022.5, subdivision (a) (hereafter section 12022.5(a)); (3) as to counts 13, 14, and 16, that Valentino personally used a firearm within the meaning of section 12022.53(b); (4) as to counts 15 and 17, that Valentino personally used a firearm within the meaning of section 12022.5(a); and (5) Valentino served a prior prison term within the meaning of section 667.5, subdivision (b).

A. *Verdicts*

The court empaneled two juries: jury A for the case against Valentino, Coleman, and Cummings; and jury B for the case against Saibu, Squire, and Buckley.

Jury A found Valentino guilty of (1) conspiracy to commit bank robbery (count 1); (2) false imprisonment (§ 236) as a lesser included offense of count 2 (kidnapping for robbery), with a true finding on the armed with a firearm allegation (§ 12022, subd. (a)(1)); (3) robbery (count 3), with a true finding on the personal use of a firearm allegation (§ 12022.53(b)); (4) unlawful possession of a firearm by a felon (count 5); (5)

robbery (count 6), with a true finding on the personal use of a firearm allegation (§ 12022.53(b)); (6) unlawful driving and taking of a vehicle (count 7); (7) unlawful possession of a firearm by a felon (count 8); (8) robbery (count 9), with a true finding on the personal use of a firearm allegation (§ 12022.53(b)); (9) assault with a firearm (count 10), with a true finding on the armed with a firearm allegation (§ 12022, subd. (a)(1)); (10) unlawful possession of a firearm by a felon (count 12); (11) robbery (count 13), with a not true finding on the personal use of a firearm allegation (§ 12022.53(b)); (12) making a criminal threat (count 15), with a not true finding on the personal use of a firearm allegation (§ 12022.5(a)); and (13) assault with a firearm (count 17), with a not true finding on the armed with a firearm allegation (§ 12022, subd. (a)(1)). Jury A found Valentino not guilty of (1) kidnapping for robbery (count 2), (2) the robbery charged in count 14, (3) the robbery charged in count 16, and (4) unlawful possession of a firearm by a felon as charged in count 18. Valentino then waived his right to a trial on the allegation he served a prior prison term (§ 667.5, subd. (b)) and admitted the prison prior.

Jury B found Saibu guilty of (1) conspiracy to commit bank robbery (count 1); (2) false imprisonment (§ 236) as a lesser included offense of count 2 (kidnapping for robbery), with the jury deadlocked on the personal use of a firearm allegation (§ 12022.53(b)); (3) robbery (count 3), with the jury deadlocked on the personal use of a firearm allegation (§ 12022.53(b)); (4) robbery (count 6), with the jury deadlocked on the personal use of a firearm allegation (§ 12022.53(b)); (5) unlawful driving and taking of a vehicle (count 7); (6) robbery (count 9), with a true finding on the personal use of a firearm allegation (§ 12022.53(b)); and (7) assault with a firearm (count 10), with a true

finding on the armed with a firearm allegation (§ 12022, subd. (a)(1)). Jury B found Saibu not guilty of kidnapping for robbery (count 2).

Jury B found Squire guilty of (1) conspiracy to commit bank robbery (count 1); (2) robbery (count 9), with a true finding on the personal use of a firearm allegation (§ 12022.53(b)); (3) assault with a firearm (count 10), with a true finding on the armed with a firearm allegation (§ 12022, subd. (a)(1)); (4) unlawful possession of a firearm by a felon (count 12); (5) attempted robbery (count 19); and (6) burglary (count 20). Also as to Squire, the jury was unable to reach verdicts on counts 2, 3, 5, 6, 7 and 8; and the court declared a mistrial as to those counts. The court granted Squire's section 1385 motion to dismiss count 2 and later granted the prosecutor's motion to dismiss the remaining counts and allegations that were the subject of the jury deadlock (counts 3, 5, 6, 7 & 8).

B. *Sentencing*[4]

The court sentenced Valentino to a total state prison term of 25 years 4 months. The sentence consists of the three-year midterm on count 3, plus a consecutive 10-year term for the section 12022.53(b) enhancement related to that count; a consecutive eight-month term on count 2, plus a consecutive four-month term for the section 12022.5(a)(1) enhancement related to that count; a consecutive one-year term on count 6, plus a consecutive term of three years four months for the section 12022.53(b) enhancement related to that count; a consecutive eight-month term on count 7; a consecutive one-year

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4 The victim restitution fines the court imposed on appellants under section 1202.4, subdivision (f) (hereafter section 1202.4(f)) are discussed, *post*.

term on count 9, plus a consecutive term of three years four-months for the section 12022.5(a)(1) enhancement related to that count; a consecutive one-year term on count 13; and a consecutive one-year term for the prior prison term enhancement. The court also imposed a concurrent prison term of two years on count 15 and stayed execution of Valentino's prison sentence on the remaining counts and allegations under section 654.

The court sentenced Saibu to a total state prison term of 16 years 4 months. The sentence consists of the three-year midterm on count 9, plus a consecutive 10-year term for the section 12022.53(b) enhancement related to that count; consecutive eight-month terms on counts 2 and 7;[5] and consecutive one-year terms on counts 3 and 6. The court stayed execution of Saibu's prison sentence on the remaining counts and allegations under section 654.

The court sentenced Squire to a total state prison term of 14 years 4 months. The sentence consists of the three-year midterm on count 9, plus a consecutive 10-year term for the section 12022.53(b) enhancement related to that count; and consecutive eight-month terms on counts 2 and 19. The court stayed execution of Squire's prison sentence on the remaining counts and allegations under section 654. Appellants' appeals followed.

C. *Contentions*

Valentino contends (1) his sentence on count 2 (false imprisonment, § 236) should have been stayed under section 654; and (2) his direct victim restitution fine must be

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5 The abstract of judgment inaccurately reflects an eight-*year*, rather than an eight-*month*, consecutive term on count 7 and does not reflect the three-year midterm on count 9. The abstract must be amended to reflect the correct terms imposed.

modified to correctly reflect the imposition of joint and several liability with his convicted codefendants and also to reflect the correct amount of restitution to be awarded to the Wells Fargo Bank on Black Mountain Road.

Saibu contends (1) the judgment must be reversed because the court, in violation of his right to federal due process and his Sixth Amendment rights of confrontation and to a jury trial, improperly excluded evidence of robberies that were committed in the same manner in the charged crimes, and suggested individuals other than Saibu and his codefendants committed the charged crimes; (2) the judgment of guilt should be reversed because the accomplice instruction given in this case under CALCRIM No. 335 instructed the jury that the evidence supporting the testimony of an accomplice need only be "slight" and "tend to" connect Saibu to the crimes, in violation of Saibu's Fifth and Fourteenth Amendments right to due process of law, and his Sixth and Fourteenth Amendments right to a jury trial; (3) the judgment of guilt must be reversed because the evidence was insufficient as a matter of law to corroborate the accomplice testimony of Rachel Kinsel (Kinsel), and Saibu was therefore convicted in violation of federal due process of law; (4) the judgment of guilt should be reversed because the court, in response to questions from the jury, erroneously failed to instruct the jury that Kinsel's out-of-court statements were not corroborating evidence within the meaning of CALCRIM No. 335, and thereby violated Saibu's right to federal due process of law and his Sixth and Fourteenth Amendments right to a jury determination of the facts; (5) the consecutive sentence imposed for count 2 (false imprisonment: § 236) should be modified to a concurrent term because the court was precluded from imposing a

consecutive sentence for that count under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); and (6) the court violated Saibu's right to due process of law by calculating the victim restitution award to Wells Fargo Bank in the amount of $12,388 when substantial evidence supported an award of only $12,255. Saibu joins the arguments made by Valentino and Squire.

Squire contends (1) the court improperly excluded evidence of similar robberies committed at the same time, in the same geographic area, and having similar modus operandi, and thereby impermissibly precluded the introduction of relevant evidence in violation of Squire's rights to present evidence in his defense, to confront witnesses against him, to a jury trial, and to due process; (2) the court erred in failing to instruct the jury sua sponte on assessing Kinsel's credibility and specifically considering the beneficial plea bargain she received in return for testifying against Squire and the remaining defendants; (3) the judgment of guilt on counts 9 through 12 should be reversed because the court erred by failing to instruct the jury, in response to jury note No. 15, that Kinsel's out-of-court statements could not constitute corroborating evidence within the meaning of the third prong of CALCRIM No. 335, and thereby violated Squire's rights to due process and to jury trial under the Sixth and Fourteenth Amendments; and (4) the court erred in calculating the victim restitution award to Wells Fargo Bank in the amount of $12,388 when substantial evidence supported an award of only $12,255, and therefore the award was an abuse of discretion and violated Squire's due process rights, requiring the award to be vacated and reduced. Squire joins in all issues raised by Valentino and Saibu that may accrue to Squire's benefit.

We reject all of appellants' contentions, with the exception of those relating to the court's victim restitution orders. We modify the judgments with respect to those orders and affirm the judgments in all other respects.

FACTUAL BACKGROUND

A. *The People's Evidence*

1. *August 13 Wells Fargo Bank Robbery on El Cajon Boulevard*

At around 9:15 a.m. on August 13, Lucy Verduzco went to the Wells Fargo Bank on El Cajon Boulevard in San Diego to make a deposit. As she was leaving the bank through the south doors, a gray or light blue medium-sized, four-door car sped into the parking lot and stopped in front of her. Three armed African-American men got out of the car. All three were dressed in dark clothing; they were wearing hooded sweatshirts and bandannas.

The three men ran up to Verduzco, and the driver of the car ordered her to go back into the bank. Verduzco complied.

The men ran into the bank through the south door. Two had shotguns or rifles; the other had an AK-47. They pointed the weapons at everyone in the bank and ordered everyone to get down on the ground. One of the men went down the teller line, pointing his weapon at each teller, saying, "Give me the [motherfucking] money. Hurry up. Give it to me now." Two of the tellers handed the man cash from their drawers. The man put the bundles of cash into a black bag. One of the tellers pressed the silent alarm.

A second man waved a gun in the face of Jonathan Dadbin, trying to get him to open the security door to the teller windows and vault room, and demanded in an aggressive fashion that Dadbin open the door. Dadbin refused.

After a few minutes, the three men left the bank through the south door and got into a light-colored car. As the men fled the scene in the car, one of the bank employees wrote down a partial license plate number. Michael Miranda, a San Diego Police Department patrol officer, responded to the call regarding the robbery and searched the surrounding area for a vehicle matching the description given by witnesses. At around 10:00 a.m., he found a gray, two-door Acura parked about two blocks south of the Wells Fargo Bank. The front and rear passenger doors were open. Officer Miranda impounded the vehicle.

2. *August 19 World Savings Bank robbery in La Mesa*

On August 19, between 8:00 and 8:15 a.m., Javier Banuelos Venegas drove his purple 1995 Ford Windstar minivan carrying a California license plate number to a Shell gas station and minimart in National City. Banuelos pulled into the parking lot, left his keys in the ignition with the engine running, and went inside the minimart to buy a cup of coffee. When he returned to the parking lot, Banuelos found his minivan was gone.

Later that morning, at around 9:20 a.m., Banuelos's minivan pulled into the parking lot of the World Savings Bank located on Lake Murray Boulevard in La Mesa and stopped with its rear facing the employee break room. Three African-American men, including the driver, got out of the van. The men were wearing dark blue and black clothing consisting of sweatpants, hooded sweatshirts and bandannas. One of them wore

a medium to dark blue sweatsuit with golf raglan sleeves, black shoes, and a brown and white bandanna. Another man was wearing gloves which were cut off at the knuckles. All three men were carrying shotguns or rifles. One of the men was similar in skin color, height and built to Valentino. Another was about the same height and build as Saibu.

The men entered the bank holding their weapons. One said, "This is a robbery. Everybody get down on the ground." One of the customers who was on the phone told the person on the other end of the line that a robbery was in progress and to call the police.

One of the armed men jumped on the teller counter, went to where the tellers were standing, and opened the security door for the other two armed men, who walked down the inside of the teller line in opposite directions. One of the men opened the teller drawers, removing the cash from the drawers and placing it in a duffel bag. One directed Jeanene Krahling, the bank's vault teller, to get the keys to the vault. After Krahling got the keys, the man held his gun to her head and told her to hurry up. She preceded him into the vault, pulled out the locker tray, and he grabbed the money from the tray. The man put the money in a black bag, thanked Krahling, and exited the vault. As all three men were leaving the bank, one of them said, "Have a nice day." The men took $14,905 during the robbery.

La Mesa police officers responding to the call about the robbery found Banuelos's minivan parked about three blocks away from the bank. One of the vehicle's sliding doors was open.

3. *August 29 Wells Fargo Bank robbery on Black Mountain Road*

On August 29, at around 7:00 a.m., DeWayne Cummings, Sr. (Cummings Sr.) was getting ready for work when he heard a car horn across the street. He looked outside and saw a white, box-shaped car. He woke up his son, DeWayne Cummings, Jr. (Cummings), and opened the front door to allow in Saibu, who was one of his son's friends. Cummings Sr. saw Kinsel sitting on the couch. Saibu had been to the house several times.

Later that morning, at around 9:30 a.m., three African-American men armed with rifles and wearing dark clothing, hooded sweatshirts and bandannas entered the Wells Fargo Bank on Black Mountain Road in Mira Mesa. One was carrying a duffel bag. One said, "You're being robbed. This is a robbery." Cristina Rantael, the bank's service manager pressed the silent alarm.

One of the men jumped over the teller counter and let the other two men in through the security door. One man went down the teller line, opened all the registers, took the money, and put it in a bag.

One of the men told Rantael to open the main vault. Rantael asked teller Cyrus Safa, who had the keys, to go with them to the vault. Branch manager Marian Tyler also went with them after one of the men pointed a rifle at her head and ordered her to open the security door leading to the vault room.

As Rantael was trying to open the vault door, one of the men held his rifle to her head, started counting backwards, and stopped counting when he reached two because Rantael opened the door. One of the men grabbed the money from the vault and yelled to

another to get the "moneybag." The man put his gun under his arm and put the money into a duffel bag. The money that the men took contained dye packs that explode with tear gas and red dye.

The men ran out of the bank and got into a silver Mazda 626. On their way out, one said, "Have a nice day."

After the men left the bank, the dye packs exploded. When police responded to the scene, they found a medium size duffel bag in the parking lot that contained $82,133. The money in the bag was stained with red dye and smelled like tear gas.

At around 10:00 a.m. that same morning, August 29, Elliott Woodward, a college student, was sitting in his parked car on a side street near Mira Mesa Boulevard. Woodward saw people wearing dark clothing get out of a small white car, run across the street, and get into a small red car, which then drove past Woodward's car. Finding their behavior suspicious, Woodward wrote down the license plate number of the red car, then walked over to the white car. The engine was still running, the doors were open, and it appeared to have been hotwired. Woodward flagged down a passing police car. An officer impounded the white car, which was a Mazda 626.

In the afternoon on August 30, James McGhee, a detective with the San Diego Police Department robbery unit, telephoned Saibu on Saibu's cell phone, a number that began with "709." Detective McGhee told Saibu that his name had come up in connection with a series of bank robberies that were under investigation. Saibu told Detective McGhee he was in Mississippi with his family, he had been there about a week, and he had received a call from Cummings Sr., who told him that something was going

on with Saibu's cousin. Saibu said he did not know what part of Mississippi he was in, because he did not know his way around there, and his family was at work. He indicated to Detective McGhee that when they returned, he would ask them and call Detective McGhee back. Detective McGhee told Saibu he wanted to verify that Saibu was in Mississippi and asked Saibu to step outside and look at an address or pick up a piece of mail and check out the address. Saibu refused and told Detective McGhee that Cummings was not involved.

When Detective McGhee then asked Saibu who was involved, Saibu responded, "Rachel [Kinsel] and Ace [Valentino]." Saibu added that "Ace" was someone named Antonio, he did not know Antonio's last name or where he lived, and he had only met Antonio on a couple of occasions. Saibu said he would return from Mississippi on Friday and would meet with Detective McGhee in person upon his return. Saibu complained that he was hearing that he was the mastermind. He also told Detective McGhee that Cummings Sr. told him, "[W]hen you guys find me, you're gonna shoot me on sight or some kinda crap like that." Saibu also said he was told he would be thrown in jail and given "two life sentences." Saibu did not contact Detective McGhee that Friday as he said he would.

Detective McGhee eventually interviewed Saibu at police headquarters and told him he wanted to talk about some robberies. Detective McGhee asked Saibu where he had been. Saibu replied he left for New York in June or July and remained there until around Christmas time. Saibu then changed the starting date of his New York trip to "July or August." Saibu said he was visiting with a childhood friend and with his father.

When Detective McGhee asked whether he knew a woman named Rachel, Saibu said he did not. Detective McGhee then asked Saibu whether he knew a woman named Rachel Kinsel. Saibu said he had never heard that name before. When Detective McGhee told Saibu that his phone number was in Kinsel's cell phone book, Saibu said he did construction work and gave his business cards to a lot of people. When Detective McGhee asked Saibu whether he knew Coleman, Saibu indicated he did not. Saibu gave the same answer when asked whether he knew a man named "Ace" or Valentino, or Cummings, or "Mike [Squire]." When Detective McGhee showed Saibu a photograph of Valentino, Saibu said he looked like a dude he had met or seen at a check cashing place a week earlier.

When Detective McGhee asked Saibu whether his fingerprints would be found in Kinsel's car, Saibu said they would be on the stereo and the inside of the car, and they could be in the trunk. Detective McGhee asked whether Saibu had a cell phone, and Saibu replied he had several cell phones and had lost a couple of them in New York, including a phone with a number that began with "709." When Detective McGhee referred to the telephone conversation he had with Saibu the previous August, Saibu first said he did not remember the conservation. He then said he thought it was a joke.

4. *Kinsel's plea agreement and accomplice testimony re the bank robberies*

Through the license plate information that Woodward provided, the police determined that the red car was a 1993 Mazda owned by Kinsel. Officers went to Kinsel's apartment in Imperial Beach, where they saw the red Mazda parked about 100 to

150 yards from where she lived. They searched Kinsel's bedroom and found $1,026 inside a foam container. The cash was stained with red dye.

In the afternoon on August 29, Kinsel was arrested for the August 13, 19 and 29 bank robberies. Kinsel eventually admitted she was the getaway car driver for all three robberies. Charges were filed against her, and counsel appointed to represent her.

On September 9, after consulting with her attorney, Kinsel signed an agreement titled "Agreement Regarding the Initial Meeting Between Potential Cooperating Individual and Prosecution," under which she agreed to participate in a "free talk" interview at the district attorney's office where she would provide details about the crimes.

On January 6, 2006, on the advice of counsel, Kinsel signed a second agreement, titled, "Office of the District Attorney Cooperating Individual [] Agreement" (CI agreement) and entered into a plea agreement. Kinsel pleaded guilty to three counts of armed robbery, each one a "strike," with an agreed-upon sentence range of four to seven years, in return for truthful testimony at trial. Under the CI agreement, the original charges would be reinstated if her testimony were not truthful, and she would be charged with perjury.

Kinsel testified that in August Coleman was her boyfriend. Cummings was one of Coleman's friends. In March Coleman had introduced Kinsel to his cousin, Valentino. Kinsel and Valentino became good friends, and they spoke on the phone about once a day. Coleman had also introduced Kinsel to Saibu and Squire.

Early in the morning on August 13, while Kinsel was at Coleman's house, Valentino approached her and said he, Saibu and Squire were going to rob a bank. Valentino offered her $1,000 to give them a ride after the robbery. Kinsel owned a 1993 burgundy Mazda MX6. She retrieved her car keys and went into the living room; Saibu and Squire were there. Two shotguns and a long handgun were on the floor. Sometime between 8:00 and 9:00 a.m., Valentino indicated it was time to leave and told Kinsel that he, Saibu and Squire were going to the bank in a stolen car and that she should follow them in her car. Kinsel followed them. After stopping at Polk Avenue and 30th Street, they directed Kinsel to wait there, and then they drove away. Saibu asked that she leave her car trunk open so they could put the guns in the trunk when they returned.

When Valentino, Saibu and Squire returned about 15 to 20 minutes later, they got into her car and she drove them to Coleman's house. During the return trip, appellants discussed how they wished they could have "hit the safe." Saibu paid Kinsel the agreed-upon sum of $1,000.

Kinsel testified that on August 19, she again drove the getaway car after appellants robbed a bank. That day she saw appellants in Coleman's living room. The men were wearing dark hooded sweatshirts and jeans, and each was holding a bandanna. She saw the same three guns. Appellants asked Kinsel to help by driving as she did on August 13. Appellants got into a purple van. At trial, Kinsel indicated that a photograph of Banuelos's Ford Windstar minivan depicted the van that appellants used on August 19. Valentino told her that he waited at a gas station until someone left a car with the keys in the ignition, then he "hopped in it and took it."

Driving her own car, Kinsel followed appellants to a park in La Mesa. where appellants directed her to pull over, leave the trunk open, and wait. When appellants returned about 15 to 20 minutes later, they got into her car and she drove them to Coleman's house. During the return trip, one of the appellants joked about saying "have a nice day" at the end of the robbery. Saibu paid $1,000 to Kinsel, who gave some of the money to Coleman.

Kinsel also testified that one of the appellants asked her to again be the getaway driver in a robbery that would take place on August 29. Saibu had telephoned her a couple of days earlier to tell her about the plan. In the evening on August 28, Saibu phoned Kinsel and asked her to pick him up early the next morning and to call him at 5:00 a.m. When Kinsel called Saibu early in the morning on August 29, Saibu gave her directions to his location in east San Diego. She could not find the location and telephoned Saibu several times on his cell phone while she was in her car to tell him she was lost. Kinsel finally met up with Saibu between 5:20 and 5:30 a.m., and Saibu got into her car. Saibu told her to drive him to Mira Mesa, then directed her to a Wells Fargo Bank near Black Mountain Road. Saibu showed her a side street near the bank and told her that was where she would wait for them Kinsel then drove Saibu back to where she had picked him up.

At some point in the morning on August 29, Valentino telephoned Kinsel and asked her for a ride. She drove Valentino to Cummings's house, where she and Valentino met Saibu and Squire. Kinsel saw Saibu take the guns out of his car. Appellants put on black hooded sweatshirts and dark jeans. Squire's sweatshirt had the word "Outkast" on

it. Saibu told her that because the police would be looking for three African-American men, on the return trip Squire would lie down on the back seat, he (Saibu) would hide in the trunk, and because Valentino is not Black, he would sit in the front seat with Kinsel.

Appellants went to the bank in a silver Mazda, and Kinsel followed them in her car. She stopped and waited at the prearranged location. When appellants returned about 20 minutes later, they had a small black duffel bag, and it looked like they had been crying. Kinsel asked what was wrong, and Valentino said something about gas going off. Saibu put the guns in the trunk of Kinsel's car. Kinsel drove appellants back to Cummings's house. Kinsel was paid $1,000 for her assistance.

5. *September 8 USA Federal Credit Union robbery in Mira Mesa*

On September 8, at around 10:44 a.m., four men dressed in black clothing robbed the USA Credit Union on Black Mountain Road. One of the men, an African-American, jumped over the counter separating the tellers from the customers. He told everyone to get down. A second man, who was light-skinned, was holding a light purple pillowcase. Two men guarded the door.

The man who had jumped over the counter told employee Joy Taguiped to get the cash box. The man holding the pillow case took the cash out of her drawer. One of the men took customer Merri Jo Hendricks's purse containing her driver's license, social security card, and some checks. She never saw her purse again.

As the men were running across the bank's parking lot, a red dye pack in the money they had taken was activated.

Detective McGhee impounded Valentino's Buick Regal. A pair of black jeans marked with red coloring was in the trunk. A receipt from the Wal-Mart Store on Murphy Canyon Road was in the car showing purchases in the morning on September 8 of two baseball caps, two packages of bandannas, Jersey Nick gloves, and a black "two extra large" hooded sweatshirt. Valentino's personal property included money stained with red dye.

A receipt from the Big Lots store on Euclid Avenue showed the purchase of a king-size pillow case on September 8 at 9:07 a.m..

Eugene Bojorquez, an officer assigned to the San Diego Police Department's robbery unit, assisted in the investigation of the September 8 robbery. Officer Bojorquez also assisted in searching a room that Valentino rented at the Value Inn in Lemon Grove. The officers found more dye-stained money, a large plastic bag containing clothing, a duffel bag, and a man's white T-shirt with red stains.

On September 9, Detective McGhee and Robert Sylvester, also a detective with the San Diego Police Department, interviewed Valentino at the police station. Valentino said that several items of clothing found in the trunk of his car belonged to him. Valentino initially said the hotel key card found in his possession was to a room at the Comfort Inn where he worked, but later admitted the key was to a room at the Value Inn in Lemon Grove. Valentino initially denied owning any of the items found in the Value Inn room, but later admitted the items were his. Valentino initially said he was not involved in any robberies, and when asked whether he would tell the detectives if he was involved in any bank robberies, Valentino said, "No comment." When asked what he

meant by "No comment," Valentino said he did not commit the robberies. Upon further questioning as to whether he was involved, Valentino said, "No. Probably. No comment better."

Detective Sylvester told Valentino he wanted Valentino to disclose where the guns were so that no one would get hurt. Valentino told Detective Sylvester the guns were "put up," which Detective Sylvester interpreted to mean they were in a safe location where children and other people could not get them. Valentino mentioned that the TEC-9 had a "hair trigger."

Hendricks testified she was contacted after the robbery by representatives of companies that had accepted forged checks written on her account.

Detective Sylvester interviewed Shella Daet in March 2006. Daet told him that Valentino and Buckley came over to her house on September 8, and Buckley gave her Hendricks's driver's license, social security card, and blank checks. Daet also told Detective Sylvester that Valentino and Buckley looked very nervous and that Buckley told her, "I don't want to see this ID again. I don't care what you do with it. I don't want it back."

At trial, Daet testified that Buckley did not give her a purse on September 8, and on that day she found Hendricks's driver's license, social security card, and a check lying on the ground outside her house. Daet admitted she and someone else altered Hendricks's driver's license by changing the photograph of Hendricks and putting her own on it. She also admitted she used Hendricks's blank check. Daet stated that she did not tell the truth when she told Detective Sylvester she got the property from Buckley and that she did not

recall telling Detective Sylvester that Valentino was with Buckley on September 8. Daet admitted that when she was arrested in March 2006, she was in possession of Hendricks's property. She also admitted she pleaded guilty in June 2005 to receiving stolen property.

6. *November 23 VIP Jewelry Store attempted robbery*

On November 23 at around 10:20 a.m., Kevin Lee, the owner of VIP Jewelry Store on Euclid Avenue, saw two men wearing black hooded sweatshirts enter his store. One man was holding a hammer, the other a bag. Lee and Sandra Dawson, a customer in the store, each saw the man with the hammer hit the glass counter with the hammer.

Robert Summers, an officer with the San Diego Police Department, went to the VIP Jewelry Store on November 23 in response to a radio call reporting a robbery there. Summers collected pieces of broken glass stained with blood. Officer Bojorquez obtained a swab sample of the blood for lab analysis. A DNA comparison of the blood on the glass was consistent with the sample DNA taken from Squire. The probability that the predominant blood stains were left by someone other than Squire was one in 310 sextillion for the African-American population.

7. *Saibu's cell phone records*

Saibu's cell phone records for August were received in evidence.

8. *DNA evidence*

Amy Rogala, a criminalist with the San Diego Police Department, tested two tank tops, a toothbrush, a cigarette butt, two football jerseys, and a light blue bandanna, which were collected from several of the codefendants' residences, against known DNA samples from Valentino, Buckley and Coleman. The DNA found on the tank top and toothbrush

was consistent with DNA from Valentino. Rogala also tested the DNA taken from the blue bandanna and a black Reebok shoe and found it consistent with DNA from Coleman.

Ian Fitch, a criminalist with the forensic biology unit of the San Diego Police Department crime lab, performed a DNA analysis on various items of clothing that Detective McGhee seized from Cummings's bedroom in connection with the August 29 robbery. Squire's DNA was found on the inside tag of a right glove, the palm of the glove, the tag of a black T-shirt made by "Outkast Clothing," and a semen stain on the T-shirt.

B. *The Defense*

Following the presentation of various stipulations, the defense rested.

DISCUSSION

I. *EXCLUSION OF EVIDENCE OF OTHER BANK ROBBERIES*

Saibu contends the judgment must be reversed because the court, in violation of his right to federal due process and his Sixth Amendment rights of confrontation and to a jury trial, improperly excluded evidence of robberies that were committed in the same manner in the charged crimes and suggested individuals other than Saibu and his codefendants committed the charged crimes. Making essentially the same contention, Squire maintains the court improperly excluded evidence of similar robberies committed at the same time, in the same geographic area, and having similar modus operandi, and thereby impermissibly precluded the introduction of relevant evidence in violation of

Squire's rights to present evidence in his defense, to confront witnesses against him, to a jury trial, and to due process.

A. *Background*

On August 10, 2006, Valentino filed a set of in limine motions, including one asking the court to admit "third party culpability" evidence of other bank and credit union robberies and attempted robberies committed by different suspects in San Diego County in June and July of 2006. Attached as exhibits to the motions were two news articles ("Authorities Identify Possible Serial Bank Robbers," published Aug. 5, 2006, at the *Yahoo! News* Web site and "Warrants issued for men linked to bank robberies: Up to 10 crimes could be related," published August 4, 2006, in *The San Diego Union-Tribune* newspaper) reporting that two African-American men, 24-year-old Jean Pierre Rices and 31-year-old Lewis Hodges, were suspects in up to 10 actual or attempted robberies committed between June 1, 2005 and July 31, 2006. Specifically, the articles stated that Rices and Hodges were suspected of trying to rob a Bank of America branch on Second Street in El Cajon on July 28, 2006; of robbing a Washington Mutual bank branch on Winter Gardens Boulevard in Lakeside on July 31, 2006; and of trying to rob the USA Credit Union on Black Mountain Road in Mira Mesa, also on July 31, 2006. The articles reported that authorities believed Rices and Hodges might also be responsible for seven other bank robberies or attempted robberies.[6] The robberies listed in the articles did not

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6 The article published in *The San Diego Union-Tribune* reported that the following seven additional "bank heists and attempted robberies" might be "linked" to the three committed on July 28 and 31, 2006: "7/27/06: San Diego National Bank, Mira Mesa";

include any of the four robberies involved in the instant case, all of which were committed in 2005. Valentino's codefendants joined in this motion.

The court held a two-day hearing on the motion. Codefendants' counsel asked the court to admit evidence of the June 2005-July 2006 robberies and attempted robberies because they involved the same modus operandi involved in the commission of the 2005 offenses at issue in the instant case.

Upon inquiry from the court, all defense counsel agreed there was no direct evidence linking any third party to one or more of the crimes charged in the instant case. The reporter's transcript of the August 22, 2006 hearing shows the following exchanges took place between the court and defense counsel:

> "The Court: . . . I think everybody can agree there's no direct evidence linking any unnamed third party to the crimes that are charged; is that something that everybody can agree on?
>
> "[Valentino's counsel, Keith Rutman]: Such as, yeah. An informant who says that Mr. Smith out there is the guy who really did these bank robberies. I think I'd have to agree that there's no evidence like that.
>
> "The Court: Mr. Cox, related to direct evidence, do you agree?
>
> "[Squire's counsel, Joseph Cox]: I agree.
>
> "The Court: Mr. Puglia?
>
> "[Saibu's counsel, Frank Puglia]: Yes, Your Honor.

"7/08/06: Citibank, La Mesa"; "6/23/06: Point Loma Credit Union, National City"; "6/21/06: Mission Federal Credit Union, Carlsbad"; "7/07/05: Bank of the West, Spring Valley"' "6/03/05: USE Credit Union, La Mesa"; and "6/01/05: Point Loma Credit Union, National City."

"The Court: Ms. Bukowski?

"[Cummings' counsel, Roxane Bukowski]: Yes.

"The Court: Mr. Fielding?

"[Coleman's counsel, John Fielding]: Yes, Your Honor.

"[Buckley's counsel, Brian Funk]: Yes.

"The Court: Okay. So the only thing is w[h]ether or not . . . the circumstantial evidence . . . is sufficient to warrant allowing the third party culpability defense."

The court informed counsel that "where I'm stuck at is the requirement that there has to be some direct or circumstantial evidence. I understand what circumstantial evidence is, connecting a third party to these crimes. [¶] . . . I think it's far too generic to just say there were other Black men out there committing crimes. We have police reports in evidence. There has to be some link. There has to be something that connects them there other than something that's marginal [such] as race and some aggressive style."

On August 23, 2006, the second day of the hearing, Saibu's counsel made an additional offer of proof regarding three bank robberies committed on May 3, June 3, and July 7 of 2005, which he claimed demonstrated "pretty much the same [modus operandi]."

After considering the relevant case law, the court denied without prejudice the defense in limine request to present the proffered third party culpability evidence. The court indicated that the issue to be determined was whether the proffered evidence was capable of raising a reasonable doubt as to the defendants' guilt with respect to the charged crimes; and, specifically, whether there was a sufficient direct or circumstantial

evidentiary link between the charged and uncharged offenses. Noting that "we have several bank robberies that are similar as to time" and general location with similar modus operandi involving dark clothing, masks, guns, and aggressive behavior, the court found the similarities argued by defense counsel were "far too general" to allow the court to make a finding that the evidence was capable of raising a reasonable doubt as to the defendants' guilt.

During trial, the defense renewed the motion to present the proffered third party culpability evidence. The court again denied the motion, finding that the defense had provided no substantive evidence of a link or nexus between the uncharged robberies and the offenses charged in this case.

B. *Analysis*

In *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*), the California Supreme Court clarified the rules governing the admission of third-party culpability evidence. The high court explained that, "[t]o be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be *capable of raising a reasonable doubt of defendant's guilt*. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime*." (Italics added.) The *Hall* court rejected the contention that a defendant's constitutional right to present a defense precludes any

application of section Evidence Code section 352[7] to third party culpability evidence and explained that, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." (*Hall*, *supra*, at p. 834.)

Thus, the Supreme Court in *Hall* adopted a two-step test (*Hall* test) for determining the admissibility of proffered third party culpability evidence. First, the court must determine whether there is direct or circumstantial evidence that both links the third party to the actual perpetration of the crime and is capable of raising a reasonable doubt of defendant's guilt. (*Hall*, *supra*, 41 Cal.3d at p. 834; accord, *People v. DePriest* (2007) 42 Cal.4th 1, 43 ["Under *Hall* and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime'"]; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137 [no direct or circumstantial evidence that a drug dealer named "Pablo" committed the murder]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1325 [evidence that victim had previously feared "a man" was insufficient to link someone other than defendant to the actual perpetration of the murder].) Second, the court must determine whether the evidence is admissible under Evidence Code section 352. (*Hall*, *supra*, at pp. 834-835;

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7 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

accord, *Bradford*, *supra*, 15 Cal.4th at p. 1325 [in assessing an offer of proof relating to evidence of the culpability of a third party, the court "must decide whether . . . it is substantially more prejudicial than probative under Evidence Code section 352"].) The United States Supreme Court has approved the *Hall* test under federal constitutional principles. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327.)

Here, as already noted, all defense counsel agreed during the hearing on the in limine motion that there was no direct evidence linking Hodges, Rices, or any other third party to the crimes with which Saibu and Squire were charged in the instant case.

We conclude the court did not abuse its discretion in finding the proffered circumstantial similarities between the uncharged robberies and the charged robberies were "too general" to support a finding that the evidence was capable of raising a reasonable doubt as to the defendants' guilt.[8] The record of the in limine proceedings shows the court carefully considered all 14 of the proffered circumstantial similarities

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8 In his opening brief, Squire asserts the defense raised during the in limine motion proceedings the following 14 "points of similarity" between the uncharged robberies and the charged robberies: (1) Each robbery involved three or four African-American perpetrators; (2) the perpetrators all wore black clothing; (3) the perpetrators all wore hooded sweatshirts; (4) the perpetrators had an aggressive style and jumped onto the bank counters; (5) the perpetrators wore masks or bandanas:; (6) the perpetrators waved rifles or shotguns around; (7) the perpetrators ordered people inside the bank to get down; (8) each bank robbery occurred in a similar area in San Diego County; (9) each bank robbery occurred at the same time of day; (10) each bank robbery occurred in the same general period of time; (11) similar bank robberies continued to occur after the defendants were in custody; (12) USA Bank was robbed twice after appellants were in custody; (13) the perpetrators wore dark gloves; and (14) the uncharged robbery on September 27 shared with the August 29 robbery the feature that one of the perpetrators took a bank teller into the vault and counted backwards to hurry the teller in cooperating with the perpetrator's orders.

argued by defense counsel. For example, the court found that "it's far too generic to just say there were other Black men out there committing crimes," and "[t]here has to be something that connects them there other than something that's marginal [such] as race and some aggressive style." The court discussed the two robberies in which tellers with guns to their heads were taken to a vault and the perpetrator holding the gun counted backwards to get the teller to hurry up in opening the vault. The court also noted that "we have several bank robberies that are similar as to . . . general times" and "general locations," and "[i]t appears that they have similar [modus operandi] that had been previously listed—black clothing, dark clothing, masks, guns, aggressive behavior, things of that nature." Stating it "just cannot, in the facts that we have, get beyond the general similarities," the court found the proffered similarities were "far too general" to allow the court to make a finding that the evidence was capable of raising a reasonable doubt. The court did not abuse its discretion.

Because the proffered evidence was insufficient under the first prong of the *Hall* test to raise a reasonable doubt as to Saibu's and Squire's guilt, we need not reach the second prong of that test, and we conclude the court did not err by excluding that evidence.

II. *SUFFICIENCY OF CORROBORATING EVIDENCE*

Saibu next contends the judgment of guilt must be reversed because the evidence was insufficient as a matter of law to corroborate the accomplice testimony of Rachel

Kinsel,[9] and thus he was convicted in violation of federal due process of law. We reject this contention.

A. *Background*

Kinsel's accomplice testimony incriminatingly linked Saibu with the charged August 13, 19 and 29 bank robberies. As requested by stipulation of the parties, the court instructed Jury B with a modified version of CALCRIM No. 335, which instructed the jury that if the specified crimes were committed, Kinsel was an accomplice and her testimony had to be corroborated by "other evidence that you believe." Jury B found Saibu guilty of robbery as charged.

B. *Applicable legal principles*

A conviction cannot be based on an accomplice's testimony unless other evidence tending to connect the defendant with the commission of the offense corroborates that testimony. (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986, citing § 1111.) Corroborative evidence may be slight or entirely circumstantial and entitled to little consideration when standing alone, but it must tend to implicate the defendant by relating to an act that is an element of the crime. (*McDermott*, *supra*, 28 Cal.4th at p. 986.) "The corroborating evidence need not by itself establish every element of the crime; but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime" (*ibid.*) in a way that reasonably satisfies a jury that the accomplice is telling the truth. (*People v. Sanders* (1995) 11 Cal.4th 475, 535.)

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9 Kinsel's testimony is summarized, *ante*, in the factual background.

Independent evidence that places a defendant with coconspirators on the day of a charged offense, and which shows he gave police a false alibi after the crime, may sufficiently corroborate an accomplice's incriminating testimony. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1013.) An accused's attempts to conceal his whereabouts "may warrant an inference of consciousness of guilt and may corroborate an accomplice's testimony." (*People v. Avila* (2006) 38 Cal.4th 491, 563.)

"Corroborating evidence may be circumstantial in nature, and may consist of evidence of the defendant's conduct or his declarations." (*People v. Garrison* (1989) 47 Cal.3d 746, 773.) The trier of fact's finding on the issue of corroboration may not be disturbed on appeal unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

C. *Analysis*

Here, the trial record contains evidence, independent of Kinsel's accomplice testimony, which, by showing both that Saibu was with his coconspirators on the day of a charged offense and that he gave the police two false alibis after the crime, reasonably tends to connect him with the commission of the bank robberies and is sufficient to corroborate Kinsel's accomplice testimony. Cummings Sr.'s testimony thus placed Saibu in Cummings Sr.'s home with Cummings and Kinsel, in the morning on August 29, the day appellants, Cummings and Coleman allegedly robbed the Wells Fargo Bank in Mira Mesa as charged in count 9.

Jury B also heard Detective McGhee's recorded telephone interview of Saibu, which took place the next day, August 30, when McGhee called Saibu's cell phone number, which McGhee had obtained from Kinsel. The transcript of the interview establishes that Saibu gave Detective McGhee a false alibi. Specifically, the transcript shows that when Detective McGhee told Saibu that his name had come up in connection with a series of bank robberies that were under investigation, Saibu falsely told Detective McGhee he was in Mississippi with his family, and he had been there about a week. When Detective McGhee told Saibu he wanted to verify that Saibu was in Mississippi and asked him to step outside and look at the address, or pick up a piece of mail and check out the address, Saibu refused. When Detective McGhee asked Saibu who was involved in the robberies, Saibu responded, "Rachel [Kinsel] and Ace [Valentino]," adding that "Ace" was someone named Antonio whose last name he did not know. Saibu said he would return from Mississippi on Friday and would meet with Detective McGhee in person upon his return. Detective McGhee testified that Saibu did not contact him that Friday as he said he would.

Detective McGhee also testified he eventually interviewed Saibu at the police headquarters, told him he wanted to talk about some robberies, and asked Saibu where he had been. Saibu gave a second false alibi, telling Detective McGhee he left for New York in June or July, and remained there until around Christmas time. Saibu then changed the starting date of his New York trip to "July or August," and said he was visiting with a childhood friend and with his father. When Detective McGhee asked Saibu whether he knew a woman named Rachel Kinsel, Saibu falsely said he had never

heard that name before. When Detective McGhee asked Saibu whether he knew a man named "Ace" or Valentino, or Cummings, Saibu falsely indicated he did not.

We conclude that the foregoing independent evidence, by placing Saibu with coconspirators on the day of the August 29 Wells Fargo Bank robbery, and by establishing he twice gave a false alibi to the police following the crime thereby evincing a consciousness of guilt, is sufficient to corroborate Kinsel's accomplice testimony. We need not address the People's argument that additional corroborating evidence is found in Saibu's August cell phone records, which were received in evidence.

III. *CLAIM OF INSTRUCTIONAL ERROR* (*CALCRIM NO. 335*)

Saibu also contends the judgment of guilt should be reversed because the accomplice instruction the court gave under CALCRIM No. 335 instructed the jury that the evidence supporting the testimony of an accomplice need only be "slight" and "tend to" connect Saibu to the crimes, in violation of Saibu's Fifth and Fourteenth Amendments right to due process of law, and his Sixth and Fourteenth Amendments right to a jury trial. Specifically, Saibu maintains that CALCRIM No. 335 is constitutionally infirm because (1) it failed to tell the jury that the accomplice, Kinsel, had to be credible beyond a reasonable doubt; and (2) the language instructing the jury that the evidence supporting Kinsel's testimony only had to be "slight" and "tend to connect the defendant to the commission of the crimes" did not require proof beyond a reasonable doubt. We reject this contention.

A. *Background*

The court instructed the jury with a modified version of CALCRIM No. 335, as follows:

> "If the crimes of [c]onspiracy to commit robbery, kidnapping, robbery, assault with a deadly weapon, or unlawful driving or taking of a vehicle were committed, then Rachel Kinsel was an accomplice to those crimes. [¶] You may not convict the defendant based on the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's statement or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's statement or testimony; [¶] AND [¶] 3. That supporting evidence *tends to* connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be *slight*. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. [¶] However, Defendant's own statement and inferences therefrom may be sufficient corroborative testimony. [¶] Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence." (Italics added.)

Saibu acknowledges that defense counsel did not object to the instruction.

B. *Analysis*

Saibu's claim that CALCRIM No. 335 as given by the court unconstitutionally lessened the prosecution's burden of proof by "requir[ing] far less proof than [proof] beyond a reasonable doubt," is unavailing. In *People v. Frye* (1998) 18 Cal.4th 894, 965-

966, the California Supreme Court held that under the principles governing the law of accomplices, "[c]orroboration need only be slight" and rejected the defendant's characterization of the accomplice corroboration requirement as an element of the crime subject to proof beyond a reasonable doubt. In light of our conclusion, we need not address the People's contention that Saibu forfeited his claim of instructional error by failing to object at trial to the giving of CALCRIM No. 335.

IV. *CLAIMED SUA SPONTE DUTY TO GIVE A CAUTIONARY INSTRUCTION*

Squire contends as to counts 9 through 12 that the court erred in failing to instruct the jury sua sponte on assessing Kinsel's credibility and specifically considering the beneficial plea bargain she received in return for testifying against Squire and the remaining defendants. In his counsel's "Errata Letter of Correction" dated January 10, 2008, Squire also asserts his trial counsel provided ineffective assistance for (1) failing to request such an instruction, and (2) failing to "focus argument on the specific benefits former codefendant Kinsel received in return for her testimony, the risk that she faced without her plea agreement[,] and that she still awaited her own sentencing." We reject these contentions.

Squire complains that under the plea agreement, Kinsel faced a maximum prison sentence of four to seven years, with all remaining charges to be dismissed at her sentencing. Squire also complains that although the court instructed the jury under CALCRIM No. 335 that "[a]ny statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with *caution*" (italics added), the court should have instructed the jury to view Kinsel's testimony with "close scrutiny" in light of

her status as a criminal informant benefiting from a plea. Squire points out that the jury sent a note to the court that focused on Kinsel's testimony, her status as an accomplice, and the corroboration required under CALCRIM No. 335.[10] Squire also proposes that the sua sponte instruction he claims should have been given be based upon the Ninth Circuit Model Criminal Jury Instruction No. 4.9, which instructs the jury to "examine [the witness's] testimony with *greater caution* that that of other witnesses." (Italics added.)

Squire forfeited his claim. "If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. [Citation.] His failure to do so waives the claim in this court." (*People v. Dennis* (1998) 17 Cal.4th 468, 514.) Here, Squire acknowledges he made no such request at trial.

Even if we considered Squire's claim on its merits, it would fail. The court also instructed the jury under CALCRIM No. 226,[11] which lists, among other factors to be

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10 Jury note No. 15 asked: "Can we use a supporting statement to connect more than 1 defendant and satisfy item 3 in instruction 335, even though the evidence doesn't specifically connect a particular defendant?"

11 CALCRIM No. 226, as given by the court, provided: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness

considered in assessing the credibility of a witness: "Was the witness's testimony influenced by . . . a personal interest in how the case is decided?"; and, "Was the witness promised immunity or leniency in exchange for his or her testimony?" Thus, not only did the court's instruction under CALCRIM No. 335 direct the jury to view Kinsel's accomplice testimony with "caution," its instruction under CALCRIM No. 226 directed the jury, in assessing her credibility, to consider both whether her testimony was influenced by a personal interest in the outcome of the case and whether she was promised immunity or leniency in exchange for her testimony. The record shows the jury was fully informed about the nature of Kinsel's plea agreement.

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testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] *Was the witness's testimony influenced by* a factor such as bias or prejudice, a personal relationship with someone involved in the case, or *a personal interest in how the case is decided*? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Did the witness admit to being untruthful? [¶] Has the witness been convicted of a felony? [¶] *Was the witness promised immunity or leniency in exchange for his or her testimony?* [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." (Italics added.)

Here, the court's instructions under CALCRIM Nos. 226 and 335 adequately directed the jury, in assessing Kinsel's credibility as an accomplice witness who (as the jury was aware) had entered into a plea agreement in exchange for her testimony, to view her accomplice testimony with caution and to consider the fact that she was testifying pursuant to the plea agreement. Squire's reliance on *Banks v. Dretke* (2004) 540 U.S. 668 and *On Lee v. United States* (1952) 343 U.S. 747 is misplaced, because neither case imposes on trial courts the obligation to give such a cautionary instruction. We conclude the court did not err by failing to sua sponte give the cautionary instruction proposed by Squire. Accordingly, we reject Squire's claim of ineffective assistance of counsel.

V. *COURT'S RESPONSES TO JURY INQUIRIES*

Saibu contends the judgment of guilt should be reversed because the court, in response to questions from jury B, erroneously failed to instruct the jury that Kinsel's out-of-court statements were not corroborating evidence within the meaning of CALCRIM No. 335, and thereby violated Saibu's right to federal due process of law and his Sixth and Fourteenth Amendments right to a jury determination of the facts. Squire makes essentially the same contention, asserting the judgment of guilt on counts 9 through 12 should be reversed because the court erred by failing to sua sponte instruct the jury, in response to jury note No. 15, that Kinsel's out-of-court statements could not constitute corroborating evidence within the meaning of the third prong of CALCRIM No. 335, and thereby violated Squire's rights to due process and to a jury trial under the Sixth and Fourteenth Amendments. These contentions are unavailing.

A. *Background: Jury B's notes Nos. 14, 15 and 21*

On October 13, 2006, during deliberations, jury B sent two written inquiries to the court. In note No. 14 the jury asked: "Instruction [CALCRIM No.] 335, Item 3:[12] Does guilt of one crime fulfill the requirement of being supporting evidence that tends to connect, although slight? [¶] (If we believe [Kinsel], and we believe there is guilt in another crime, can that belief in guilt of one crime be used as supporting evidence in another crime?"

In note No. 15, as already discussed, the jury asked: "Can we use a supporting statement to connect more than 1 defendant and satisfy item 3 in [CALCRIM No.] 335, even though the evidence doesn't specifically connect a particular defendant?"

The court drafted responses to the inquiries and contacted counsel, all of whom approved the responses. In response to note No. 14, the court wrote: "You may not use a finding of guilt on other crimes as supporting evidence tending to connect one to the commission of the crime in question. [¶] However, the facts used to reach such a finding may be used as supporting evidence if those facts tend to connect one to the crime in question[]."

The court wrote in response to note No. 15: "You may use a defendant[']s own statement[s] as corroboration against him but not against the other defendants." The last

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12 In the interest of clarity, we reiterate that item 3 of CALCRIM No. 335 provides: "You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] . . . [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes."

paragraph of the court's responses stated: "To address both questions refer to the last four paragraphs of [CALCRIM No.] 335."

Thereafter, on October 16, 2006, jury B sent note No. 21 to the court, asking: "If the facts by witnesses of 8-19-05 tend to connect the defendant/defendants by adding the testimony of the accomplice ([Kinsel]) which supports the evidence[,] is that enough to fullfill [*sic*] the requirements of [CALCRIM No.] 335? [¶] We need clarification!" The court contacted counsel, and all agreed with the court's proposed written response. The court sent the jury that response, which stated: "Refer to response to questions 14 & 15. Again, if you believe the facts[,] the answer is yes."

On October 19, 2006, after all counsel again agreed to the court's proposed responses to jury B's notes Nos. 14 and 15, the court read the responses to the jury. The jury foreman then informed the court, "That really wasn't where we were getting hung up," and stated "[t]here's one statement in particular." With the consent of all counsel, the court asked, "What is the statement?" The jury foreman replied, "In [Kinsel's] testimony, she recalled hearing, "Have a nice day."

The court then held a conference with counsel off the record. Thereafter, in chambers, defense counsel and the court agreed that the question was a factual one, and not a legal one; the prosecutor believed it was a legal one. Eventually, with the consent of all counsel, the court informed the jury that counsel would think about the matter overnight, and the court would have a response for the jury the following morning.

Thereafter, the court sent jury B the followup response, which stated in part: "During a court inquiry yesterday, . . . you specified that the 'supporting statement'

mentioned in Jury Note [No.] 15, was a statement from [Kinsel], an accomplice. [¶] ANSWER: [¶] For [p]urposes of CALCRIM [No.] 335 item 3, you may consider testimony of an accomplice to connect more than one defendant to the commission of a crime if: [¶] 1. The accomplice's testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's statement or testimony; [¶] AND [¶] 3. There is other evidence that you believe which also tends to connect the other defendants to the commission of the crime."

B. *Analysis*

"""It is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal.""" (*People v. Mays* (2007) 148 Cal.App.4th 13, 37.) Here, as the foregoing record demonstrates, Saibu and Squire did not object to the court's responses to jury B's notes Nos. 14, 15 and 21; and in fact, through counsel, they agreed with the responses given by the court. We conclude their claim of error is barred by the doctrine of invited error.

Even if the claim were not barred, and assuming without deciding that the court erred, any such error was harmless under any standard. For reasons already discussed, we have concluded, as to Saibu, that sufficient independent evidence corroborates Kinsel's accomplice testimony. As to Squire, the People argue that Kinsel's testimony incriminating him with respect to the August 29 robbery was sufficiently corroborated both by DNA evidence and by Saibu's August cell phone records. Unlike Saibu,

however, Squire has not challenged the sufficiency of the evidence corroborating Kinsel's testimony. Squire has failed to demonstrate prejudice.

VI. *BLAKELY/CUNNINGHAM* (*SAIBU'S CONSECUTIVE PRISON TERMS*)

Saibu also contends the consecutive sentence imposed for count 2 should be modified to a concurrent term because the court was precluded from imposing a consecutive sentence for that count under *Blakely*, *supra*, 542 U.S. 296. We reject this contention.

A. *Background*

Saibu was convicted of count 2 (§ 236) for the false imprisonment of Lucy Verduzco on August 13 and of count 3 (§ 211) for the robbery of the Wells Fargo Bank robbery in east San Diego on that same date. The court imposed consecutive sentences for those convictions.

B. *Analysis*

Saibu asserts the consecutive sentence for count 2 should be modified to a concurrent term because *Blakely* required the jury to make the findings of fact required to impose a consecutive sentence for that count. As Saibu acknowledges, however, this court is bound by *People v. Black* (2007) 41 Cal.4th 799, 806 (*Black II*). (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In *Black II*, the California Supreme Court held that discretionary imposition of consecutive sentences does not implicate a defendant's Sixth Amendment rights. (*Black II*, *supra*, 41 Cal.4th at p. 821.) The California Supreme Court explained: "The high court's decision in *Cunningham*[*v. California* (2007) 549 U.S. 270 does not call into question the conclusion we previously

reached regarding consecutive sentences. The determination whether two or more sentences should be served in this manner is a 'sentencing decision[] made by the judge after the jury has made the factual findings necessary to subject the defendant to the statutory maximum sentence on each offense' and does not 'implicate[] the defendant's right to a jury trial on facts that are the functional equivalent of elements of an offense.' [Citation.]" (*Black II*, *supra*, 41 Cal.4th at p. 823, citing *People v. Black* (2005) 35 Cal.4th 1238, 1264 (*Black I*).) Pursuant to *Black II*, we conclude the court did not violate Saibu's federal constitutional right to a jury trial in imposing consecutive sentences.

VII. *SECTION 654: VALENTINO'S COUNT 2 CONSECUTIVE PRISON TERM*

Valentino contends his sentence on count 2 should have been stayed under section 654. We reject this contention.

A. *Background*

Valentino's conviction of false imprisonment, as a lesser included offense of the kidnapping for robbery charged in count 2, was based on events that occurred on August 13 at the Wells Fargo Bank in east San Diego shortly before Valentino, Saibu and another man robbed that bank. At trial, the false imprisonment victim, Lucy Verduzco, testified she went inside the bank at around 9:15 a.m. to make a deposit. When she was done, she exited the bank through the south door that faced the parking lot. As she was walking, a car sped into the parking lot and stopped about five feet in front of her. Verduzco stated that three armed men got out of the car. The men ran up to her, and the driver angrily ordered her to go back into the bank. Verduzco complied. The men ran into the bank

through the south door, and Verduzco stayed inside the bank for about 15 minutes, praying, while the men committed robbery.

B. *Applicable Legal Principles*

Section 654 states an act punishable in different ways by different provisions of the Penal Code may be punished under only one such provision.[13] This section applies not only to a single act violating multiple provisions of the code but also to an indivisible course of conduct violating several statutes. Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant, not the temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) If all the criminal acts were incident to one objective, then punishment may be imposed only as to one of the offenses committed. (*People v. Beamon* (1973) 8 Cal.3d 625, 636-639.) If there were multiple objectives, punishment may be imposed for each crime even if the objectives were furthered by "'common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Vidaurri* (1980) 103 Cal.App.3d 450, 465.) Further, if the evidence discloses the defendant's acts were independent and divisible, then "he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted.)

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13 Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Thus, section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct" (*People v. Deloza* (1998) 18 Cal.4th 585, 591) and ensures that the defendant's punishment will be commensurate with his or her criminal culpability. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) If a defendant suffers two convictions, and punishment for one is barred by section 654, that section requires that the sentence for one conviction be imposed and that the other be imposed and then stayed. (*Deloza*, *supra*, 18 Cal.4th at pp. 591-592.)

Generally, the trial court has broad discretion in determining the factual issue of whether a defendant has multiple objectives for purposes of section 654, and on appeal we will uphold the court's express or implied finding that a defendant held multiple criminal objectives if it is supported by the evidence. (See *People v. Osband* (1996) 13 Cal.4th 622, 730.)

C. *Analysis*

We reject Valentino's claim that Verduzco's false imprisonment was incidental to the robbery. As the foregoing substantial evidence demonstrates, Valentino falsely imprisoned Verduzco while he and his cohorts were in the Wells Fargo Bank parking lot *before* they entered the building to rob the bank. Valentino did not have to force Verduzco, who had already exited the bank building when Valentino and his cohorts arrived, to go back inside the bank in order to accomplish their robbery objective. Valentino's independent criminal act of falsely imprisoning did not in any way facilitate their commission of the robbery. We conclude Valentino's act of gratuitous violence against Verduzco, an unresisting victim, was not incidental to the August 13 robbery for

purposes of section 654. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190 [gratuitous violence against a helpless and unresisting victim has traditionally been viewed as not "incidental" to robbery for purposes of § 654].) Valentino's reliance on *People v. Han* (2000) 78 Cal.App.4th 797 is misplaced, as the victims in that case were inside the residence the defendants entered to commit various crimes. (*Id.* at pp. 799-800.)

VIII. *VICTIM RESTITUTION AWARD*

Last, Valentino contends his direct victim restitution "fine" (§ 1202.4(f)) must be modified to correctly reflect the imposition of joint and several liability with his convicted codefendants. Valentino also contends his direct victim restitution "fine" must be modified to reflect the correct amount of restitution to be awarded to the Wells Fargo Bank on Black Mountain Road. Saibu and Squire raise the same claim. We will modify the judgment.

A. *Background*

Valentino was sentenced on December 8, 2006. The court ordered Valentino under section 1202.4(f) to pay direct victim restitution in the total amount of $55,564, including $12,338 to be paid to the Wells Fargo Bank on Black Mountain Road. The court stated, "Restitution is joint and several with the codefendants. As stated to [Saibu], [Squire], [Kinsel]—striking [Kinsel]. We had a separate calculation there." Item No. 11 of the abstract of judgment lists the following: "VICTIMS—$14,303.00 WELLS FARGO BANK, EL CAJON BLVD./$12,338.00 WELL[S] FARGO BANK, BLK[.]

MOUNTAIN RD./$14,905.00 WORLD SAVINGS BANK, LAKE MURRAY BLVD./$14,018.00 USA FEDERAL CREDIT [UNION], BLK. MOUNTAIN RD."

Saibu was sentenced on February 9, 2007.)! The court ordered Saibu under section 1202.4(f) to pay direct victim restitution in the total amount of $41,546, including $12,388 to be paid to the Wells Fargo Bank on Black Mountain Road. The court also ordered, "That is joint and several with co-defendants in this case: [Kinsel], [Valentino], and [Squire]. Item No. 11 of the abstract of judgment states in part: "RESTITUTION TO BE PAID TO: WELLS FARGO [BANK] $12,338.00 (BLACK MOUNTAIN ROAD); WELLS FARGO [BANK] $14,303 (EL CAJON BLVD[.]); WORLD SAVINGS [BANK] (LAKE MURRAY BLVD.) $14,905 * WELLS FARGO RESTITUTION TO BE PAID JOINT AND SEVERAL WITH CO-DEFENDANTS [VALENTINO], [SQUIRE], AND [KINSEL]."

Squire was also sentenced on February 9, 2007.)! The court ordered Squire under section 1202.4(f) to pay direct victim restitution in the total amount of $14,388, including $12,388 to be paid to Wells Fargo Bank. The court also ordered, "[T]hat is joint and several with the co-defendant[s] [Valentino] and [Saibu] and [Kinsel]." Item No. 11 of the abstract of judgment states in part: "RESTITUTION TO BE PAID TO: VIP [JEWELRY STORE] $2,000; WELLS FARGO [BANK] $12,338 * WELLS FARGO RESTITUTION IS TO BE PAID JOINT AND SEVERAL WITH CO-DEFENDANT [SAIBU]."

B. *Applicable Legal Principles*

Victim restitution is mandated by the California Constitution, which provides in part that "[r]estitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary." (Cal. Const., art. I, § 28, subd. (b).)

Section 1202.4(f) implements the constitutional mandate of restitution for crime victims by providing that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct," the trial court "shall require that the defendant make restitution to the victim" and must order "full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record."

Although section 1202.4(f) does not expressly authorize joint and several liability restitution orders, the courts in California have held that section 1202.4(f) authorizes a sentencing court to order codefendants convicted of the same offense to pay direct victim restitution fines jointly and severally. (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049, 1051-1052.)

C. *Analysis*

1. *Restitution award to the Wells Fargo Bank on Black Mountain Road*

Valentino contends the court made a slight mathematical error in calculating the amount of the section 1202.4(f) victim restitution it awarded to the Wells Fargo Bank on Black Mountain Road. Specifically, Valentino claims his probation report showed that $82,133 of the $94,388 taken during the August 29 robbery of that branch of the Wells

Fargo Bank was recovered, such that the bank's actual economic loss was $12,255, but the court made a $133 calculation error by awarding victim restitution in the amount of $12,338. The People agree, and assert that the total amount of restitution appellants owe to Wells Fargo Bank should be reduced by $133 to $12,255.

Valentino's probation report does show that appellants took $94,388 during the August 29 robbery of the Black Mountain Road branch of Wells Fargo Bank, and that $82,133 was recovered. Thus, the actual economic loss that the Black Mountain Road branch of Wells Fargo Bank suffered as a result of the August 29 robbery was $12,255 ($94,388 - $82,133 = $12,255). By awarding victim restitution under section 1202.4(f) in the amount of $12,338, the court committed a $133 calculation error ($12,338 - $12,255 = $133).

We conclude that each of the judgments entered against appellants should be modified so as to (1) reduce the total amount of victim restitution awarded to the Black Mountain Road branch of Wells Fargo Bank by $133 from $12,338 to $12,255; and (2) reduce by $133 the overall amount of victim restitution the court ordered each of the appellants to pay to the various lending institutions they robbed. Thus, the overall amount of victim restitution the court ordered Valentino to pay to those institutions must be reduced from $55,564 to $55,431 ($55,564 - $133 = $55,431); the overall amount of victim restitution the court ordered Saibu to pay must be reduced from $41,546 to $41,413 ($41,546 - $133 = $41,413); and the overall amount of victim restitution the court ordered Squire to pay must be reduced from $14,388 to $14,255 ($14,388 - $133 = $14,255).

2. *Joint and several liability with Saibu and Squire*

Valentino alone also contends the abstract of the judgment entered against him does not reflect that the court ordered his liability to be "joint and several" with Saibu and Squire for the victim restitution awarded under section 1202.4(f) to the two Wells Fargo Bank branches, the World Savings Bank, and the USA Federal Credit Union. Valentino further contends the court "did not differentiate between the four bank robberies in this case, and the four resultant restitution fines." He asserts that because Saibu was jointly convicted as to each of the first three robberies (on August 13: Wells Fargo Bank, as charged in count 3; August 19: World Savings Bank, as charged in count 6; and August 29: Wells Fargo Bank, as charged in count 9), the award of joint and several liability with him for those three robberies "appears correct," while the award of joint and several liability with Saibu "does not appear authorized" as to the fourth robbery (on September 8: USA Federal Credit Union, as charged in count 13) as to which Saibu was not convicted. Valentino argues the court should have imposed joint and several restitution liability for each of the first three robberies (August 13, 19, and 29) as to both Saibu and himself, and should have imposed additional joint and several restitution liability as to Squire with respect to the third of those robberies (i.e., the August 29 Wells Fargo Bank robbery).

The People agree with this contention, asserting the abstract of judgment should be modified to reflect that Valentino is jointly and severally liable (1) with both Saibu and Squire for the economic loss suffered on August 29 at the Black Mountain Road branch of Wells Fargo Bank, (2) with Saibu alone for the losses suffered on August 13 at

Wells Fargo Bank in east San Diego and August 19 at World Savings Bank, and (3) with no one else for the losses suffered on September 8 at USA Federal Credit Union.

The record shows that Valentino was convicted of all four of those robberies (counts 3, 6, 9, & 13); Saibu was convicted of the first three of the four robberies, specifically, the robberies committed on August 13 at Wells Fargo Bank on El Cajon Boulevard, August 19 at World Savings Bank, and August 29 at Wells Fargo Bank on Black Mountain Road; and Squire was convicted of only one of the four robberies, specifically, the robbery committed on August 29 at Wells Fargo Bank on Black Mountain Road. As to Squire, the court declared a mistrial with respect to the robberies charged against him in counts 3 and 6, and then dismissed those counts on the prosecutor's motion.

Accordingly, we conclude the judgment entered against Valentino should be modified so that, with respect to direct victim restitution (§ 1202.4(f)), Valentino is held (1) jointly and severally liable with Saibu for the economic losses suffered as a result of the robberies they jointly committed on August 13 (count 3), August 19 (count 6), and August 29 (count 9); and (2) jointly and severally liable with Squire for the economic loss suffered as a result of the robbery they jointly committed on August 29 (count 9).

As so modified, the judgment holds Valentino (1) jointly and severally liable with only Saibu for the $14,303 in economic loss suffered by the Wells Fargo Bank on El Cajon Boulevard as a result of the August 13 robbery (count 3) and for the $14,905 in economic loss suffered by the World Savings Bank as a result of the August 19 robbery (count 6); and (2) jointly and severally liable with both Saibu and Squire for the $12,255

in economic loss suffered by the Wells Fargo Bank on Black Mountain Road as a result of the August 29 robbery (count 9).

3. *Joint and several liability with Kinsel*

Valentino also contends that "remand appears necessary to correct a clerical error with respect to imposition of joint and several liability with respect to co-defendant [Kinsel] for these bank robberies," asserting that at Valentino's sentencing, "the court did not impose joint and several liability with [Kinsel]," as shown by the court's statement that "we had a separate calculation there."

As discussed, *ante*, the abstract of the judgment entered against Valentino is silent as to whether the court ordered him to pay direct victim restitution jointly and severally with any of his codefendants. The abstract of the judgment entered against Saibu indicates the court ordered Saibu to pay direct victim restitution "joint[ly] and several[ly] with [Valentino], [Squire], and [*Kinsel*]. (Italics added.) The abstract of the judgment entered against Squire indicates the court ordered him to pay direct victim restitution "joint[ly] and several[ly] with [Saibu]." Saibu and Squire do not challenge these provisions of the abstracts of judgment.

Because both the transcript of Valentino's sentencing proceeding and the abstract of the judgment entered against him indicate the court did not order Valentino to pay direct victim restitution jointly and severally with Kinsel, we reject Valentino's claim that this matter should be remanded to correct a clerical error with respect to imposition of joint and several liability with respect to Kinsel.

4. *Possible retrial of Squire and Buckley*

Last, Valentino asserts that "remand appears particularly appropriate in this case so that the trial court can consider and impose any further joint and several restitution fines with respect to co-defendants Squire and Buckley in the event they were retried and convicted of these same bank robberies following their hung juries in their respective cases at this trial." We reject this contention.

As a preliminary matter, we note that on December 11, 2006, on the prosecution's motion, the court dismissed counts 3, 5, 6, 7, and 8, and all attendant allegations, charged against Squire.

We reject Valentino's request for remand with respect to this matter. In the event restitution liability is imposed on Buckley, Valentino's remedy is a motion under section 1202.4(f)(1) to modify the restitution order.[14]

DISPOSITION

Each of the judgments entered against appellants is hereby modified so as to (1) reduce the total amount of victim restitution awarded under section 1202.4(f) to the Black Mountain Road branch of Wells Fargo Bank by $133 from $12,338 to $12,255; and (2) reduce by $133 the overall amount of victim restitution the court ordered each of the

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14 Section 1202.4(f)(1) provides: "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion."

appellants to pay to the various lending institutions. The judgment entered against Valentino is also hereby modified so that, with respect to direct victim restitution (§ 1202.4(f)), Valentino is held (1) jointly and severally liable with Saibu for the economic losses suffered as a result of the robberies they jointly committed on August 13 (count 3), August 19 (count 6), and August 29 (count 9); and (2) jointly and severally liable with Squire for the economic loss suffered as a result of the robbery they jointly committed on August 29 (count 9). As modified, the judgments are affirmed. For the reasons discussed in footnotes 1 and 5 of this opinion, the trial court is directed to amend Saibu's abstract of judgment to reflect that (1) his true last name is "Saibu," not "Salbu"; (2) the court imposed an eight-month, rather than an eight-year, consecutive term on count 7; and (3) the court imposed the midterm of three years on count 9. The trial court is directed to amend the abstracts of judgment in accordance with this disposition and to forward them to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.